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June 17, 2010

VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: STB Docket No. 42120, *Cargill, Incorporated v. BNSF Railway Company*

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding, please find Cargill, Incorporated's Reply in Opposition to BNSF Railway Company's Motion for Partial Dismissal.

Please provide electronic receipt of this filing.

Sincerely,

John H. LeSeur
An Attorney for Cargill, Incorporated

Enclosures

cc: Counsel for Defendant per Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

CARGILL, INCORPORATED	)	
Complainant,	)	
v.	)	Docket No. 42120
BNSF RAILWAY COMPANY	)	
Defendant.	)	

CARGILL'S REPLY IN OPPOSITION TO BNSF RAILWAY COMPANY'S MOTION FOR PARTIAL DISMISSAL

Cargill, Incorporated ("Cargill") files this reply in opposition to BNSF Railway Company's ("BNSF's") Motion for Partial Dismissal ("Motion") of Cargill's complaint ("Complaint"). Motions to dismiss complaints "are disfavored and rarely granted."[1] This case is no exception.

Cargill alleges in its Complaint that BNSF is engaged in clearly unlawful practices, including using its fuel surcharge program as a profit center and using its fuel surcharge procedures to double recover its incremental fuel cost increases. BNSF asserts that, even if these allegations are true, the Board lacks jurisdiction to consider most of them. BNSF further claims that the Board lacks jurisdiction to award damages to Cargill, even if Cargill proves that BNSF is engaged in blatantly unlawful surcharge practices.

As demonstrated below, the Board unquestionably has the authority to consider all of the allegations set forth in Cargill's Complaint and, once proven, to prescribe reasonable

[1] *Entergy Arkansas, Inc. v. Union Pacific R.R. Co.*, STB Docket No. 42104 (STB served Dec. 30, 2009) at 3 ("*Entergy*").

fuel surcharge practices and award Cargill monetary damages. Moreover, it is also clear that BNSF has not gotten the message set forth in the Board's decisions in *Fuel Surcharges*[2] and *Dairyland*[3] – the Board will not tolerate deceptive fuel surcharge practices.

BACKGROUND

Starting in *Fuel Surcharges*, the railroad industry has repeatedly, and unsuccessfully, attempted to block the STB's review of its unlawful fuel surcharge practices. BNSF's Motion is the most recent iteration of this failed strategy.

Fuel Surcharges

The Board instituted the *Fuel Surcharges* proceeding in March of 2006. The Board did so in response to outrage expressed by Members of Congress, and rail shippers, that railroads were engaged in abusive fuel surcharge tactics, including misrepresenting their fuel surcharges as recovering only incremental fuel cost increases when in fact the railroads were manipulating the surcharges to recover huge profits. *Fuel Surcharges II* at 1-2.

In the proceedings that followed at the Board, rail shippers submitted both oral and written statements demonstrating that the railroads were engaged in a series of unreasonable practices that had a common purpose – to over-recover their actual fuel cost increases on

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[2] *Rail Fuel Surcharges*, STB Ex Parte No. 661 ("*Fuel Surcharges*") (STB served Mar. 14, 2006) ("*Fuel Surcharges I*"); (STB served Aug. 3, 2006) ("*Fuel Surcharges II*"); (STB served Jan. 26, 2007) ("*Fuel Surcharges III*").

[3] *Dairyland Power Coop. v. Union Pacific R.R. Co.*, STB Docket No. 42105 (STB served July 29, 2008) ("*Dairyland*").

shippers' traffic. Shippers asked the Board to take affirmative steps to end all such unreasonable practices. *See id.* at 2; *Fuel Surcharges III* at 2-3.[4]

BNSF, and other rail carriers, took a different tack. They argued that fuel surcharges were part of the total freight rates being charged, and, as a result, the Board could not regulate fuel surcharges in any way under its unreasonable practice jurisdiction. *See, e.g., Fuel Surcharges*, Comments of BNSF Ry. Co. (Oct. 2, 2006) at 10-12 ("a fuel surcharge is part of a rate and cannot be regulated as a practice"); Comments of the Association of American Railroads (Oct. 2, 2006) at 3-4 ("a fuel surcharge is a rate, not a practice"). The carriers also argued that the only way the STB could regulate rail fuel surcharges was under its reasonable rate jurisdiction. *Id.*[5]

The practical impact of the railroad industry's position was well known to rail shippers: railroads could freely misrepresent that their fuel surcharges were cost recovery mechanisms, when they clearly were not, and railroads could intentionally or unintentionally mislead their customers without their customers having any recourse to address these deceptive practices. Rail shippers also knew that the railroads' suggested "remedy" – a rate case – would insulate deceptive carrier practices from review because the Board's maximum rate standards apply only in cases where carriers exert "market dominance" over a shipper's traffic and do not address or consider issues of deception or misrepresentation.

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[4] The Board's jurisdiction over railroad practices is set forth at 49 U.S.C. § 10702(2) ("A rail carrier . . . shall establish reasonable . . . rules and practices . . . ."). This statute grants the Board "broad authority over the reasonableness of a railroad's practices." *Fuel Surcharges I* at 2.

[5] The Board's jurisdiction over railroad rates is set forth at 49 U.S.C. § 10701(d)(1) ("If the Board determines . . . that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable.").

In *Fuel Surcharges*, the STB rejected the carriers' contentions that the Board could not regulate carrier fuel surcharge practices. The Board held that the purpose of fuel surcharges was to recoup "the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied" and, as the Board explained, if a carrier was using a fuel surcharge as "a broader revenue enhancement measure," it was engaged in a "misleading and ultimately unreasonable practice." *Fuel Surcharges III* at 6-7. The Board concluded that it could exercise its regulatory authority over rail practices to stop these deceptive carrier actions because its "authority to proscribe unreasonable practices embraces misrepresentations or misleading conduct by the carriers." *Id.* at 7.

The STB also rejected the carriers' contentions that the Board could only regulate fuel surcharges in a rate reasonableness case. The Board explained that when it found that a rate was unreasonable, it prescribed the maximum amount that a carrier could charge for the involved service. *See Rail Fuel Surcharges II* at 3-4; *Rail Fuel Surcharges III* at 7. However, when exercising its authority over fuel surcharge practices, the Board was not setting a maximum rate a carrier could charge "through some combination of base rates and surcharges." *Rail Fuel Surcharges III* at 7. Instead, the Board was directing how this combination could, and could not, be made. *Id.* ("[i]f the railroads wish to raise their rates they may do so, subject to the rate reasonableness requirement of the statute, but they may not impose those increases on their customers on the basis of a misrepresentation").

After establishing its jurisdiction over fuel surcharge practices, the Board proceeded to find in *Fuel Surcharges III* that two fuel surcharge program abuses by carriers constituted unreasonable practices – "computing fuel surcharges as a percentage of a base rate" and "double dipping" which the Board defined as a "double recovery for the same fuel cost

increase[s] through application of both an index [to adjust rates] that includes a fuel component and a fuel surcharge for the same movement to cover the same time period." *Id.* at 1, 10-11.

As the Board explained, the use of percent of the base rate fuel surcharges "cannot fairly be described as merely a cost recovery mechanism" because "a fuel surcharge program that increases all rates by a set percentage stands virtually no prospect of reflecting the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied." *Id.* at 6. Similarly, the Board found that charging a shipper twice for the same fuel cost increases was an obvious unreasonable practice because a carrier should not be permitted to obtain a "double recovery for the same fuel cost increase." *Id.* at 10. The Board decided not to make its decision banning percent of rate fuel surcharges "retroactive" because the Board concluded that the railroad industry may have reasonably relied on past ICC decisions approving the use of rate-based fuel surcharges. *Id.* The Board also recognized that its "authority to determine whether any particular fuel surcharge applied by a specific railroad is an unreasonable practice, and to award damages on that basis, is limited to proceedings begun on complaint [under] 49 U.S.C. §§ 10704(b), 11701(a)." *Id.* at 8.

The Board proceeded to order rail carriers to "conform their practices to the findings contained in" its *Fuel Surcharges III* decision by April 26, 2007. *Id.* at 14. The Board did not prescribe any new fuel surcharge methods, but held that "if a carrier chooses to use a fuel surcharge program, it must be based upon attributes of a movement that directly affect the amount of fuel consumed." *Id.* at 9. Finally, the Board held that "[o]nce carriers have had an opportunity to adjust their fuel surcharge programs, should any shipper have concerns that any revised fuel surcharge program is being administered in a manner that constitutes an unreasonable practice, it may file a complaint with the Board." *Id.* at 10.

Following the issuance of *Fuel Surcharges III*, then-Board Chairman Nottingham informed Congress that "[t]he Board will aggressively use the authority granted us by statute to stop unreasonable [fuel surcharge] practices, thereby protecting shippers and advancing the public interest" and that the Board "will remain vigilant on this issue and will expeditiously review any formal complaints related to fuel surcharges." *Rail Competition and Service: Hearing Before the H. Comm. on Transp. and Infrastructure*, H.R. Rep. No. 110-70, at 23 (2007).

Dairyland

Dairyland Power Cooperative ("Dairyland") was the first shipper to take up the Board's invitation to file a fuel surcharge complaint case. On March 5, 2008, Dairyland filed a complaint at the Board alleging that "[t]he fuel surcharge payments UP has collected from Dairyland . . . constitute an unreasonable practice under 49 U.S.C. §10702(2) because these payments exceed the incremental fuel cost increases UP has actually incurred in handling Dairyland's traffic." *Id.* at 4. Dairyland subsequently informed the Board that it planned to "present substantial evidence demonstrating that UP is unlawfully utilizing its rail fuel surcharge procedures to extract substantial profits on the issue traffic."[6]

UP moved to dismiss Dairyland's complaint. In its motion, UP contended that dismissal was required because, it asserted, "Dairyland may not challenge the level of UP's fuel surcharge through an unreasonable practice claim" but instead "must file a rate complaint." *Id.* at 4. This argument was the same one the railroad industry had made and lost in *Fuel Surcharges*. UP also argued that the Board's decision in *Fuel Surcharges III* insulated any mileage-based fuel surcharges from challenge as unreasonable practices. *Id.* at 5-6

[6] *Dairyland* at 5 (quoting Dairyland's Reply in Opposition to Union Pacific's Motion to Dismiss (Apr. 11, 2008) at 2).

The Board denied UP's motion. The Board ruled that Dairyland's claim that UP was utilizing its fuel surcharges to extract unreasonable profits "could in turn call into question the reasonableness of UP's fuel surcharge program, and thus we cannot find at this point that there are no reasonable grounds for further investigation." *Id.* at 5. The Board also took the opportunity to "clarify" the type of showings that a shipper would need to make in an individual complaint case to obtain relief. *Id.* at 6.

The Board observed that Dairyland had alleged that Dairyland was entitled to relief because UP was using its fuel surcharge to over-recover the actual incremental fuel cost increases UP was incurring in handling Dairyland's traffic. *Id.* The Board held that if Dairyland proved this allegation, this showing, by itself, was not enough to demonstrate that UP was engaged in an unreasonable practice. *Id.* ("Dairyland may not base its case only on the *level* of the fuel surcharge as applied to itself."). Instead, the Board held that to meet its burden of proof when making certain forms of unreasonable fuel practice allegations, a shipper must show that the assailed fuel surcharge tariff is unreasonable when applied to all shippers subject to its terms. *Id.* at 5-6.

The Board cited several examples of the type of aggregate unreasonable practice showings it had in mind. As one example, the Board stated that "a complainant shipper might try to show that the general [fuel surcharge] formula produces fuel surcharges that do not reasonably track changes in aggregate fuel costs incurred." *Id.* at 6. The Board also stated that a shipper could "show that the general formula used to calculate fuel surcharges bears no reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied." *Id.* Finally, the Board noted that its list of showings was not exclusive because "[t]here may be other features in a particular case that would bear on the reasonableness of a particular fuel surcharge."

Id. The Board also rejected UP's claim that mileage-based fuel surcharges could not be challenged. *Id.* ("a fuel surcharge program is not automatically reasonable merely because it is mileage-based"). Finally, the Board held that a mileage-based fuel surcharge program also could be challenged "on other grounds, subject to the 2-year limitations period set forth in 49 U.S.C. § 11705(c) . . . "[f]or example, if UP had engaged in 'double dipping.'" *Id.*

Cargill's Complaint

Cargill is an international producer and marketer of food, agricultural, financial, and industrial products and services. Complaint at 1. In its daily business operations, Cargill arranges and pays for substantial volumes of common carrier traffic transported by BNSF. *Id.* at 2. BNSF imposes a mileage-based fuel surcharge on this traffic. This surcharge is set forth currently in BNSF Rules Book 6100-A, Item 3375L, Section B. *Id.* at 3.

In its Complaint, Cargill alleges that BNSF's fuel surcharges on its traffic constitute an unreasonable practice for the reasons set forth in Complaint paragraphs 6, 7 and 8. In presenting these allegations to the Board, Cargill was aware of, and took into account, the Board's rulings in *Fuel Surcharges* and *Dairyland.*

In paragraph 6, Cargill alleges that BNSF's fuel surcharges on its traffic constitute an unreasonable practice "because the general formula set forth therein to calculate fuel surcharges bears no reasonable nexus to, and overstates, the fuel consumption for the BNSF system traffic to which the surcharge is applied." *Id.* (hereinafter referred to as the "Fuel Consumption Count"). In *Dairyland*, the Board expressly determined that such an allegation would constitute a permissible claim for relief. *See Dairyland* at 6 (shipper may "show that the general formula used to calculate fuel surcharges bears no reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied").

In paragraph 7, Cargill alleges that BNSF's fuel surcharges on its traffic constitute an unreasonable practice because BNSF is "extract[ing] substantial profits over and above its incremental fuel cost increases for the BNSF system traffic to which the surcharge is applied." *Id.* (hereinafter referred to as the "Profit Center Count"). This allegation closely tracks the Board's fundamental holding in *Fuel Surcharges* – carriers cannot use their fuel surcharges to over-recover their incremental fuel cost increases, and, as the Board instructed in *Dairyland*, the allegation is directed at BNSF's "aggregate fuel costs incurred" in providing service to shippers subject to the fuel surcharge tariff. *Dairyland* at 6.

In paragraph 8, Cargill alleges that BNSF's fuel surcharges on its traffic constitute an unreasonable practice "because BNSF is double recovering the same incremental fuel cost increases BNSF has incurred in providing common carrier service to Cargill by (i) setting its base rates on Cargill traffic to include recovery of fuel prices higher than the BNSF fuel strike price of $0.73 per gallon implicit in the Assailed [Fuel Surcharge] Tariff Item, and (ii) by increasing the Cargill base rates (including the fuel component in the base rates) via rate adjustments and, at the same time, requiring Cargill to pay, in addition to the adjusted rates on these movements, the fuel surcharge set forth in the Assailed [Fuel Surcharge] Tariff Item." *Id.* (hereinafter referred to as the "Double Recovery Count"). This allegation parallels the Board's rulings in *Fuel Surcharges* that "double recovery for the same fuel cost increase" constitutes an unreasonable practice. *Fuel Surcharges III* at 10.

Cargill's Complaint asks the Board to conduct a full hearing on its Complaint under 49 U.S.C. § 10704(a)(1) and, upon conclusion of that hearing, enter an order, *inter alia*, "prescrib[ing] reasonable fuel surcharge practices," and "award[ing] Cargill damages, with interest, pursuant to 49 U.S.C. § 11704(b) for all unlawful fuel surcharge payments it has made

to BNSF." *Id.* at 4-5. This request for relief also is intended to comply with the Board's directive in *Fuel Surcharges* that, if a shipper wanted to collect damages for unreasonable fuel surcharge practices, or obtain additional prescriptive relief, it should file a complaint with the Board. *See Fuel Surcharges III* at 10.

BNSF'S Motion

In its Motion, BNSF contends that the Board lacks jurisdiction to consider Cargill's Profit Center and Double Recovery Counts. According to BNSF, these Counts raise unreasonable rate claims and the Board is foreclosed from considering them since Cargill has not alleged that any rates exceed a reasonable maximum. Motion at 7-9. BNSF also contends that Cargill is not entitled to any monetary damages if Cargill proves the allegations set forth in its Fuel Consumption Count because the Board would impermissibly be granting rate relief to Cargill. *Id.* at 9-12.

ARGUMENT

The Board can grant a motion to dismiss only if it first determines that a complaint "does not state reasonable grounds for investigation and action." *See* 49 U.S.C. § 11701(b). These are very narrow grounds and the Board looks with great disfavor on motions to dismiss. *See, e.g., Entergy* at 3 ("[w]e have frequently stated that motions to dismiss are disfavored and rarely granted"); *Dairyland* at 5 ("[m]otions to dismiss are disfavored and rarely granted") (footnote omitted); *Garden Spot & Northern Ltd. P'ship and Indiana Hi-Rail Corp. – Purchase and Operate – Indiana Rail Road Co. Line Between Newtom and Browns, IL.*, ICC Finance Docket No. 31593 (ICC served Jan. 5, 1993) at 2 ("a motion to dismiss is a disfavored request and rarely granted in judicial and administrative proceedings").

Motions to dismiss are denied routinely "to ensure that participants have a full and fair opportunity to meet their burden of proof." *National Grain and Feed Ass'n v. Burlington Northern R.R. Co.*, ICC Docket No. 40169 (ICC served June 1, 1990) at 4. In ruling on the motions to dismiss, the Board assumes "that all factors be viewed in the light most favorable to [the] complainant"[7] including all "factual allegations." *AEP Texas North Co. v. Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 41191 (Sub-No. 1) (STB served Mar. 19, 2004) at 2.

The Board should summarily deny BNSF's motion to dismiss Cargill's Profit Center and Double Recovery Counts because both Counts present not only reasonable, but compelling, grounds for investigation and action by the Board. *See, e.g., Dairyland* at 5 (holding that use of a fuel surcharge program "to extract substantial profits" is an unreasonable practice); *Fuel Surcharges III* at 10 (holding that "double recovery for the same fuel cost increase" is an unreasonable practice).

The Board should also summarily deny BNSF's motion to dismiss Cargill's prayer for damages relief because BNSF is clearly liable for damages if it engages in unreasonable fuel practices. *See* 49 U.S.C. § 11704(b) ("[a] rail carrier . . . is liable for damages sustained by a person as a result of an act . . . of that carrier in violation of [49 U.S.C. §§ 10101 to 11908, including § 10702(2)]"); *Fuel Surcharges III* at 8 (STB has the authority "to determine whether any particular fuel surcharge applied by a specific railroad is an unreasonable practice, and to award damages on that basis . . . [in] proceedings begun on complaint . . . [under] 49 U.S.C. 10704(b)") (footnote omitted).

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[7] *Albemarle Corp. v. Louisiana and North West R.R. Co.*, STB Docket No. 42097 (STB served Oct. 18, 2006) at 2.

BNSF's Motion is really a thinly veiled, collateral attack on the Board's rulings in *Fuel Surcharges* and *Dairyland* permitting shippers to file complaints seeking relief from unlawful carrier fuel surcharge practices. The Board cannot give BNSF a second bite at the apple and should not because of the important public policy issues at stake in this case. After it completed its *Fuel Surcharges* proceeding, the Board encouraged shippers to file complaints if they believed that any rail carrier was continuing to engage in unlawful fuel surcharge practices and, as a recent study jointly issued by the Departments of Agriculture and Transportation confirms, railroads are continuing to substantially over-recover their incremental fuel cost increases.[8]

Finally, while BNSF styles its Motion as requesting only a "partial" dismissal of Cargill's Complaint, BNSF is really attempting to insulate its most egregious forms of unreasonable fuel practices from Board review and to keep all unlawfully collected fuel surcharge revenues.

I.

CARGILL'S PROFIT CENTER AND DOUBLE RECOVERY COUNTS SET FORTH REASONABLE GROUNDS FOR INVESTIGATION AND ACTION BY THE BOARD

BNSF asks the Board to dismiss the claims set forth in Cargill's Profit Center Count (Complaint ¶ 7) and it's Double Recovery Count (Complaint ¶ 8). The Board must deny BNSF's request because both Counts set forth reasonable grounds for investigation and action by the Board.

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[8] U.S. Dep't of Agriculture and U.S. Dep't of Transportation, *Study of Rural Transportation Issues* (Apr. 2010) ("*USDA/DOT Study*").

A. Profit Center Count

BNSF argues that the Profit Center Count should be dismissed because this Count asks the Board to regulate the maximum "level of BNSF's rates" in contravention of the Board's holdings in *Fuel Surcharges* and *Dairyland* and the court's holding in *Union Pacific*.[9] Motion at 1, 7-9.

BNSF is mischaracterizing the relief that Cargill is requesting. Cargill is not asking the Board to impose a cap on the total amount that BNSF can charge Cargill for BNSF's transportation services on the involved movements, as Cargill would if it were filing a maximum rate case. What Cargill is asking the Board to do in its Profit Center Count is to determine whether BNSF is engaged in an unreasonable practice by collecting fuel surcharges for all traffic subject to the challenged fuel surcharge tariff that exceed BNSF's incremental fuel cost increases on that traffic, thus turning what BNSF has labeled a cost recovery mechanism into something else – a profit center.

The allegations in the Profit Center Count are clearly permissible under the Board's decisions in *Fuel Surcharges*. The Board ruled in *Fuel Surcharges* that it was an unreasonable practice for railroads to call a charge a "fuel surcharge" when its purpose was not cost recovery, but profit enhancement. *See, e.g., Fuel Surcharges II* at 7 ("If the railroads wish to raise their rates they may do so, subject to the rate reasonableness requirement of the statute, but they may not impose those increases on their customers on the basis of a misrepresentation.").

Moreover, BNSF is raising the same jurisdictional arguments the Board rejected in *Fuel Surcharges*. The Board held in *Fuel Surcharges* that it could regulate deceptive rail fuel

[9] *Union Pac. R.R. Co. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989) ("*Union Pacific*").

surcharge practices, as practices, without running afoul of its maximum rate regulation jurisdiction. The Board's ruling in *Fuel Surcharges*, and the message the Board sent to the nation's railroads, was clear – railroads can charge up to the maximums permitted by law through a proper combination of rates and fuel surcharges, but, if a carrier decides to employ a fuel surcharge, the fuel surcharge cannot over-recover "the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied." *Fuel Surcharges III* at 6. The way for a carrier to comply with these rulings is clear – take profit-based increases via means other than a fuel surcharge mechanism.

The Profit Center Count is also fully consistent with the Board's *Dairyland* decision. In *Dairyland*, the Board held that a complainant shipper could prove a carrier fuel surcharge practice was unreasonable if the shipper demonstrated "that the general [assailed fuel surcharge program] produces fuel surcharges that do not reasonably track changes in aggregate fuel costs incurred." *Id.* at 6. That is exactly what Cargill is alleging in its Profit Center Count. Cargill's Profit Center Count also addresses the Board's concerns that carriers not use their fuel surcharge programs "to extract substantial profits." *Id.* at 5.

Finally, the Profit Center Count is not precluded by the court's decision in *Union Pacific*. According to BNSF, *Union Pacific* stands for the proposition that the STB cannot use its jurisdiction over unreasonable practices to regulate the "level" of a carrier's [rates, including a] fuel surcharge. *See, e.g.*, Motion at 1. BNSF made the same argument in *Fuel Surcharges*,[10] the Board properly rejected it, and the Board should not permit BNSF to collaterally attack its prior conclusions in this case.

[10] *See Rail Fuel Surcharges*, Comments of BNSF Ry. Co. (Oct. 2, 2006) at 10-12.

In *Union Pacific*, the court reviewed an ICC decision where the ICC had found that the defendant carriers had engaged in an unreasonable practice by raising their rates to levels the ICC concluded were unreasonably high. *Id.*, 867 F.2d at 649 (observing that the ICC's unreasonable practice holding was "grounded in an implicit finding that the railroads have charged unreasonable rates"). The court reversed the ICC's decision on grounds that the agency could not use its jurisdiction over unreasonable practices to find the involved rates exceeded a reasonable maximum. *Id.* ("wherever the final line is drawn between 'practices' and 'rates,' we conclude that the ICC's regulation here falls squarely on the side of 'rates'").

The Board ruled in *Fuel Surcharges* that its exercise of regulatory practice authority over fuel surcharge payments was not barred under *Union Pacific* because the practice at issue – deceptively using fuel surcharges to over-recover incremental fuel cost increases – was unreasonable regardless of the level or the reasonableness of the total freight rates being charged and because the Board's actions did not preclude railroads from raising rates up to the reasonable maximums permitted by law, provided the carriers did not "impose those increases on their customers on the basis of a misrepresentation":

> BNSF argues that Congress could not have intended for us to regulate an individual component of a rate based solely upon the label given to it by the railroad as a fuel surcharge. But Congress, in the rail transportation policy at 49 U.S.C. 10101(9), explicitly stated that it is the policy of the United States Government "to encourage honest and efficient management of railroads." Moreover, Congress exempted the rail carriers from the consumer protection requirements of the Federal Trade Commission Act, presumably not because Congress intended to permit carriers to mislead their customers, but because our authority to proscribe unreasonable practices embraces misrepresentations or misleading conduct by the carriers. And the record in this proceeding provides extensive testimony by shippers who have expressed concern about carriers raising their rates on the pretext of recovering increased fuel costs. If the railroads wish to raise their rates they may do so, subject to the rate reasonableness requirement of the statute, but

> they may not impose those increases on their customers on the basis of a misrepresentation.

Fuel Surcharges III at 7 (footnotes omitted); *accord Fuel Surcharges II* at 4-5 (court's decision in *Union Pacific* does not preclude STB from regulating railroad fuel surcharge practices).

B. Double Recovery Count

Cargill's Double Recovery Count alleges that BNSF is double recovering the same fuel cost increases in two ways – first by "setting its base rates on Cargill traffic to include recovery of fuel prices higher than the BNSF fuel strike price of $0.73 per gallon implicit in the Assailed [Fuel Surcharge] Tariff Item" and secondly "by increasing the Cargill base rates (including the fuel component in the base rates) via rate adjustments and, at the same time, requiring Cargill to pay, in addition to the adjusted rates on these movements, the fuel surcharge set forth in the Assailed [Fuel Surcharge] Tariff Item." Complaint at 3-4.

BNSF does not seriously dispute that each allegation in the Double Recovery Count, if proven to be true, results in a double count of the same fuel cost increases. For example, if a base rate charged to Cargill included costs calculated using a fuel price of $3.00 per gallon, and the base fuel strike price implicit in the BNSF fuel surcharge applied to that traffic was set at $0.73 per gallon, BNSF would be double recovering the difference ($2.27 per gallon). As a second example, if BNSF increased the base rate (including the fuel component of the base rate) by 3%, and the 3% increase in the fuel component covered all incremental fuel cost increases, but BNSF also applied a fuel surcharge, the same fuel cost increases would be recovered twice.

BNSF concedes that the Board held in *Fuel Surcharges* that the double recovery of fuel cost increases was an unreasonable practice, but argues that the Board's holding was limited to one form of double recovery, or "double dip," where the carrier collects incremental

fuel cost increases on a shipper's traffic using both a fuel surcharge and a rate adjustment index that has a fuel component, such as the Rail Cost Adjustment Factor. Motion at 8-9. BNSF is correct that the Board expressly rejected only one form of double recovery – "application of both an index that includes a fuel component and a fuel surcharge for the same movement to cover the same time period" (*Fuel Surcharges III* at 11) – but, in so holding, the Board did not say that other forms of double recovery are permissible. Nor is there any principled basis to do so. Carriers should not be permitted to double recover the same fuel cost increases under any circumstances.

BNSF also argues that "[n]ew rates are set from time to time by BNSF without express reference to costs." Motion at 9. This is a very disturbing admission, if true. By definition, a fuel surcharge must be "limited to recouping increased fuel costs that are not reflected in the base rate." *Fuel Surcharges II* at 4. If, as BNSF's counsel is now asserting, BNSF does not look at its costs in setting its rates, BNSF should not be permitted to use fuel surcharges because there is no way for BNSF to know, much less calculate, that the fuel surcharges it is applying are "limited to recouping increased fuel costs that are not reflected in the base rate." *Id.*

Finally, BNSF argues that Cargill's Double Recovery Count "unabashedly purports to state a claim based on the level of BNSF's rates." Motion at 8. That is simply not the case. The Board ruled in *Fuel Surcharges* that double recovery of the same incremental fuel cost increases is an unreasonable practice. BNSF is free to collect revenues up to the maximums permitted by law, but BNSF cannot do so by using its fuel surcharge tariff to double recover the same incremental fuel cost increases.

II.

CARGILL CAN OBTAIN DAMAGES

BNSF concedes that Cargill's Fuel Consumption Count sets forth a cognizable claim. Motion at 13. This Count alleges that BNSF's fuel surcharge is an unreasonable practice because "the general formula set forth therein to calculate fuel surcharges bears no reasonable nexus to, and overstates, the fuel consumption for the BNSF system traffic to which the surcharge is applied." Complaint ¶ 6. However, BNSF argues that if the Board finds that these allegations are true, Cargill is entitled to no relief in the form of damages. Motion at 9-12. BNSF also argues that, if the Board does not dismiss the Profit Center Count and the Double Recovery Count, Cargill is entitled to no damages under these Counts. *Id.*

BNSF's damages contentions boil down to the proposition that, even if Cargill proves BNSF is engaging in a series of unlawful practices, and is over-recovering its actual fuel cost increases, BNSF is permitted to retain the monies it unlawfully collected unless and until Cargill demonstrates that the underlying rates exceed a reasonable maximum. BNSF's contentions here are baseless.

49 U.S.C. § 11704(b) provides that "[a] rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this part." The "part" referenced in Section 11704(b) is part A of Subtitle IV of Title 49, which includes the Board's authority over unreasonable practices set forth at 49 U.S.C. § 10702(2). Thus, Cargill is entitled by statute to damages if the Board finds that BNSF is engaged in unreasonable fuel surcharge practices.

Governing case law confirms that the Board has the authority to award damages in unreasonable practice cases[11] and the Board expressly held in *Fuel Surcharges III* that damage remedies apply in fuel surcharge complaint cases. *Id.* at 8 ("We recognize that our authority to determine whether any particular fuel surcharge applied by a specific railroad is an unreasonable practice, *and to award damages on that basis*, is limited to proceedings begun on complaint.") (Emphasis added).

The Board cannot dismiss Cargill's claim for damages. The law affords Cargill a right to damages if it proves its unreasonable practice allegations and that right cannot be extinguished in a motion to dismiss.[12]

III.

PUBLIC POLICY DEMANDS THAT THE BOARD INVESTIGATE CARGILL'S COMPLAINT

Cargill's Complaint raises basic questions concerning the legality of BNSF's fuel surcharge practices. As a matter of public policy, the Board must allow Cargill the opportunity

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[11] *See, e.g., Adams v. Mills*, 286 U.S. 397, 405 (1932) (affirming ICC order finding that the defendant carriers had engaged in an "unlawful practice" and directing the defendant carriers to pay the complainant shippers "reparations in the sum of $140,001.25"); *Kansas City Power & Light Co. v. Kansas City Southern Ry. Co.*, 361 I.C.C. 848, 853-54 (1979) ("awarding reparations on the basis of an unreasonable practice" and directing the defendant carrier to "disgorge those funds which it has wrongfully retained"); *U.S. Dep't of Energy v. Baltimore and Ohio R.R. Co.*, ICC Docket No. 37076 (ICC served Feb. 7, 1992), 1992 WL 25542 at *2, *as modified*, (ICC served July 28, 1992), 1992 WL 175930 at *5 (reaffirming earlier decisions finding that the defendant carriers had engaged in an "unreasonable practice" and ordering the defendant carriers to pay damages and interest to complainants in "the sum of $9,992,380.17").

[12] BNSF also argues that "Cargill would only suffer injury and recover damages if it paid more than its incremental fuel costs." Motion at 12. It is, of course, far too early in the proceeding for the Board to start addressing the merits of damage calculations that Cargill has not yet presented to the Board, but Cargill notes that BNSF's categorical pronouncements are incorrect. For example, Cargill's damages could be based on a comparison of surcharges it actually paid to surcharges that it would have paid under a reasonable fuel surcharge program, regardless of the actual movement-specific, incremental fuel costs of its traffic.

to present its case to the Board. The same public policy interests that led the Board to institute *Fuel Surcharges* – *i.e.*, the basic concern that carriers not use their fuel surcharge programs to over-recover incremental fuel cost increases – should lead the Board to summarily deny BNSF's motion to dismiss.

A recent comprehensive study conducted jointly by the United States Department of Agriculture and the United States Department of Transportation underscores the continuing need for Board supervision of carrier fuel surcharge practices. *See USDA/DOT Study.* Among the findings in that Study are the following:

- "There is considerable evidence that railroad fuel surcharges recovered more than the additional cost of fuel, artificially boosting railroad profits." *Id.* at ix.

- "Rail rates have increased rapidly since 2004 resulting in a surge of railroad profitability. The increase reflects not only increased rail costs, but aggressive pricing and over-recovery of fuel costs." *Id.* at 272.

- "Fuel surcharges are designed to allow railroad firms to recover the costs caused by abnormally high fuel prices; normal fuel costs have always been included in the rail rate determination. Fuel surcharges, however, have become profit centers for railroads." *Id.* at 520.

These findings underscore the need for continued vigilance by the Board to fully investigate claims that carriers are over-collecting their fuel cost increases by engaging in the practices challenged in Cargill's Fuel Consumption, Profit Center and Double Recovery Counts.

The public is clearly watching this case as well. If the STB denies BNSF's Motion, and permits the case to go forward with necessary discovery, the Board will be letting the shipping public know that it stands ready to thoroughly investigate allegations of unlawful fuel surcharge practices.

IV.

BNSF'S MOTION TO DISMISS IS HARDLY "PARTIAL"

BNSF recognizes that the Board seldom grants motions to dismiss. BNSF seeks to end-run this precedent by styling its Motion as one seeking only a "partial" dismissal of Cargill's Complaint. Motion at 13-14.

It is obvious that BNSF's Motion is anything but "partial." Cargill raises three counts seeking relief. BNSF asks the Board to dismiss two of those outright (the Profit Center and Double Recovery Counts) and to gut the third (the Fuel Consumption Count) by denying Cargill any damages if Cargill proves that BNSF is making its fuel surcharge calculations using inflated fuel consumption factors.

The Board should not be swayed by BNSF's characterization of its own Motion. BNSF's Motion, if granted, will remove major portions of Cargill's case and will leave in place egregious forms of deceptive fuel surcharge practices. The Board must not permit that to happen.

CONCLUSION

For the reasons set forth above, Cargill requests that the Board deny BNSF's Motion.

Respectfully submitted,

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Dated: June 17, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2010, I caused copies of the foregoing Reply to be served electronically upon counsel for Defendant BNSF Railway Company, as follows:

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